

Nuclear Phase-out in Belgium and Germany –

Some legal issues

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• BELGIUM

- Gradually, 1975-1985, the main source of electricity production
 - 7 PWR Power Plants
 - 1 Bi-National France-Belgium (1967-1991)
 - + 50 % of electricity generation
- 1999: decision to phase-out (green parties in government)
 - Act of 31 January 2013
 - No new nuclear power plants allowed
 - Existing ones have in principle to be closed and decommissioned 40 years after their coming in use 2015–2025
 - No compensation
 - Decommissioning and waste treatment and disposal at the expense of the private operator

- Amendment of 18 December 2013
 - 1 old plant can be operated for an extra 10 y
 - operator has to pay an extra windfall profits tax
 - upgrading works necessary
- Amendment of 28 June 2015
 - + 2 old plants can be operated for an extra 10 y
 - operator has to pay an extra windfall profits tax
 - upgrading works necessary

Constitutional Case Law

- Judgments 82/207, 22 June 2017 and 34/2020, 5 March 2020, *Inter-Environnement Wallonie* and *Bond Beter Leefmilieu Vlaanderen*

- *Against:* Act of 28 June, Amending Act of 31 January 2003 on the gradual exit from nuclear energy for industrial electricity production with a view to ensuring security of energy supply
- *Held:*
 - Reference for Preliminary Ruling to the CJEU on issues of EU Law
 - CJEU 29 July 2019, C-411/17
 - Annuls the Act of 28 June
 - Maintains into effect the legal consequences of the annulled law for almost 3 years to allow the legislator to possibly adopt a new law after a transboundary environmental impact assessment has been carried out
- The re-opening of a nuclear power plant and the prolongation of operation of another one for 10 y is under EU law subject to EIA and proper assessment of consequences on nature areas – in this case a transboundary EIA
- Retroactive annulment would jeopardize Belgium's energy supply

Related issues

- Judgment 32/2010, 30 March 2010, *Electrabel and Others*
 - *Against*: Act of 22 December 2008, Amending Act of 11 April 2003 concerning the provisions for the decommissioning of nuclear power plants and for the management of fissile materials irradiated in these nuclear power plants »
 - *Issue*: Increase of contribution of nuclear plant operators according share in nuclear energy production
 - *Held*: no discrimination in way of calculation, no retroactivity, no violation of property rights
- Judgment 106/2014, 17 July 2014, *Electrabel and Others*
 - *Against*: Act of 27 December 2012, Amending Same Act of 11 April 2003
 - *Issue*: New increase of contribution of nuclear plant operators – capture of wind fall profits 2012
 - *Held*: no violation of property right, no retroactivity, no discrimination in way of calculation, no violation of EU law

- Judgment 114/2015, 17 September 2015, *Electrabel and Others*
 - *Against*: Act of 26 December 2013, Amending Same Act of 11 April 2003
 - *Issue*: contribution of nuclear plant operators – capture of wind fall profits 2013
 - *Held*: no discrimination in way of calculation, no violation of property right, no retroactivity, no violation of EU law

- GERMANY

- Gradually, 1969-1988 increase of share of electricity production
 - 17 Nuclear Power Plants
 - ~ 34 % in 1989
- 2000: Schröder Government (soc-green) decided phase out: all nuclear power plant should gradually close – all sites closed 2022
- 2010: Merkel Government (conservative) decided to slow down closure + 12 y
- 2011: Fukushima nuclear accident – Merkel Government decided 3-month moratorium on the reactor lifespan extension

- + temporary shut down of 8 reactors
- New plan to shut down all reactors by 2022

Legal challenges:

- International Centre for Settlement of Investment Disputes 2012 - Washington DC- Vattenfall v. Germany (II) (*Vattenfall AB and others v. Federal Republic of Germany (II)*)
 - Shareholding in two nuclear power plants
 - Claims arising out of Germany's enactment of legislation to phase out nuclear power plants in the country by 2022: claim 4,7 billion EUR (5,1 billion USD)
 - “Achmea” objection turned down – case pending

- Constitutional Court (*Bundesverfassungsgericht*)
 - *6 December 2016*: the acceleration of the phase-out of the peaceful use of nuclear energy is unconstitutional:
 - it is not guaranteed that residual electricity volumes, allocated to each power plant by law in 2001 on the basis of the atomic energy consensus, could be almost completely used up for producing electricity and also because adequate compensation was not provided therefor.
 - *12 November 2020*; amended Act still unconstitutional; the compensation provided for is insufficient; Act should be reviewed again
- Compensation cases pending before civil courts